FILE COPY

Office Supreme C
OCT 21
CHARLES ELMORE

No. 519

Supreme Court of the United States.

No.

American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

Petition for Writ of Certiorari.

HARRIS B. GILMAN
Attorney for Petitioner.

ANDREW H. SIDENBERG & SON, LAW PRINTING HOUSE.

Supreme Court of the United States.

OCTOBER TERM, 1930.

No.

AMERICAN GLUE COMPANY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Respectfully represents your petitioner that:

1. This petition is brought under the provisions of sections 347 and 350 of Title 28 of the United States Code, which provide that the Supreme Court of the United States may require in any case in a Circuit Court of Appeals that the cause be certified to the Supreme Court for determination "either before or after a judgment or decree of such lower court," and further that "the application may be made at any time prior to the hearing and submission in that court." The petitioner's case is in the Circuit Court of Appeals, having been entered therein on October 9, 1930. Said case has not been heard or submitted to said Circuit Court of Appeals, and no judgment or decree has been rendered thereon.

Principal Facts.

2. On or about May 1, 1918, the petitioner, American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston, Massachusetts, filed its income and excess-profits tax returns for its calendar year 1917, and paid the income and excess-profits taxes shown by said returns, to wit: $514,311.62.

During September, 1920, the Commissioner of Internal Revenue assessed against the petitioner additional income and excess-profits taxes for the year 1917 in the amount of $173,674.61.

The petitioner paid $2450.80 and filed a claim in abatement of the sum of $171,223.81 on November 15, 1920, with the Collector of Internal Revenue.

On November 24, 1925, more than two and a half years after the running of the statute of limitations, the Collector of Internal Revenue served a warrant for distraint upon the Atlantic National Bank of Boston, and by virtue thereof seized $233,263.89 of the petitioner's money on deposit with said bank, of which the Collector claimed that $171,223.81 was the tax aforementioned and that $62,040.08 was the interest upon said sum of $171,223.81.

3. On January 15, 1929, American Glue Company, having complied with all requisite conditions precedent, brought a petition against the United States of America in the District Court of the United States for the District of Massachusetts. This petition was brought to recover said amount of $233,263.89.

Proceedings Below.

4. This case was tried on January 31, 1930, in the United States District Court for the District of Massachusetts, before Brewster, J., upon a substitute agreed statement of facts and additional oral testimony. An opinion was rendered, on June 26, 1930, ordering judgment for the respon-

dent and the said judgment was entered on September 8, 1930 (42 Fed. (2d) 235).

5. On September 12, 1930, the petitioner filed a petition for appeal to the United States Circuit Court of Appeals for the First Circuit, and accompanied said petition for appeal with its assignment of errors. Said appeal has not been heard and is still pending before the said Circuit Court of Appeals.

6. A certified copy of the entire record of said case in the District Court now pending in the Circuit Court of Appeals is herewith furnished in compliance with Rule 35 of this Honorable Court.

THE ISSUES.

7. The principal issues raised by the parties in the petitioner's case are as follows:

(1) The petitioner primarily contends—

(*a*) That the seizure by virtue of a distraint warrant of $233,263.89 by the Collector of Internal Revenue on November 25, 1925, was illegal, as it was made after the five-year period of limitation had run upon the collection of said tax liability as provided in section 250 (*d*) of the Revenue Act of 1921. This contention is not denied by the United States (R. p. 26).

(*b*) That the petitioner is entitled to recover said sum so illegally seized, with interest thereon, under the provisions of sections 3220 and 3226 of the Revised Statutes as amended, which sections are still in force and effect, and under the decision of the United States Supreme Court in the case of *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (71 L. Ed. 696).

(*c*) That the petitioner's right of action under the provisions of sections 3220 and 3226 of Revised Statutes as amended was in no way altered or amended by sections 607 and 611 of the Revenue Act of 1928.

(*d*) That sections 607 and 611 of the Revenue Act of 1928 refer to and define a new type of "overpayment" and

do not grant or deny remedies for the recovery of taxes illegally seized or distrained.

(*e*) Section 611 of the Revenue Act of 1928 cannot affect the recovery of interest illegally seized after the period of limitation where said interest was not assessed prior to June 2, 1924.

(2) The respondent contends and the United States District Court held that the petitioner's right to recover the amount so illegally seized was barred by the provisions of section 611 of the Revenue Act of 1928, because a claim for abatement of the tax in question had been filed by the petitioner, and the collection of the tax had been delayed by reason thereof.

For text of above statutes see Appendix to brief.

REASONS FOR ALLOWANCE OF THE WRIT.

8. The petitioner contends that the United States District Court erred in its rulings, opinion and judgment, as set forth in the petitioner's assignment of errors filed in the Circuit Court of Appeals and set forth on page 33 of said record attached hereto.

9. Decisions of the Circuit Courts of Appeals and the United States District Courts and the decisions of the United States Court of Claims are in conflict with respect to the issues raised by this record, as more fully set forth in the brief herewith submitted.

10. The petitioner's assignment of errors involves questions which are in general raised by appeals in certain cases now pending before the United States Supreme Court which will probably be reached for hearing during this term, *i.e.*: No. 36 *Graham* v. *Goodcell*, No. 104 *Oak Worsted Mills* v. *United States*, No. 65 *Magee* v. *United States*, No. 105 *Taft Woolen Mills* v. *United States*.

Said cases do not involve, however, all of the questions raised in the petitioner's case. Your petitioner believes that there is a great public interest in the problems involved

in these cases, as evidenced by the large number of similar cases now pending in the United States Courts throughout the country, and that because of this great public interest, the additional questions presented in its case should be considered by the United States Supreme Court at the same time as those presented in the above cases now pending, so that all the questions relevant to the principal question involved in all of the above cases shall be finally and completely determined at the time that its decision is rendered therein.

11. The questions and errors presented by this case which your petitioner believes have not been raised in any of the cases now pending before the United States Supreme Court are as follows:

(1) There was an actual seizure of the petitioner's property by the Collector of Internal Revenue by distraint proceedings, in that the *money of the petitioner* deposited in a national bank was *actually distrained and seized* by the Collector of Internal Revenue for the District of Massachusetts under a distraint warrant. The District Court was in error, therefore, in holding that sections 607 and 611 of the Revenue Act of 1928 applied to the petitioner's case, for said sections refer only to amounts "paid," and not to seizures or illegal collections, whereas said sections 3220 and 3226 of Revised Statutes expressly apply to amounts "illegally collected."

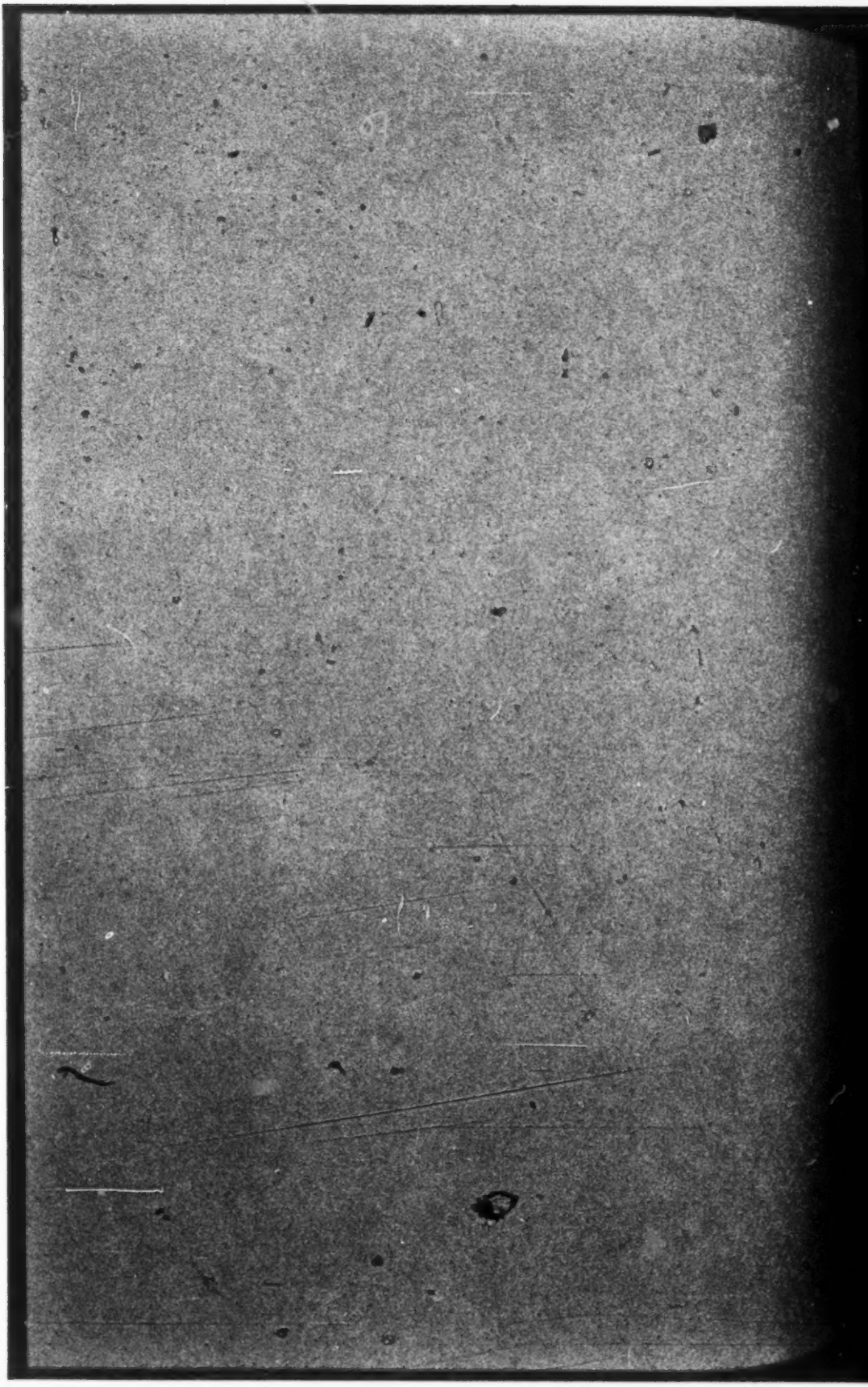
(2) Your petitioner believes that in none of the cases now pending before the Supreme Court has the question been raised in regard to the effect of section 611 upon the illegal seizure of interest by a Collector of Internal Revenue at the same time as the seizure of the tax alleged to be due. In the petitioner's case $62,040.08 was seized on November 24, 1925, which the Collector claimed to be interest upon an unpaid tax, but said *interest was not assessed prior to June 2, 1924.* Section 611 of the Revenue Act of 1928 provides that only amounts of interest actually assessed prior to

June 2, 1924, are taken out of the classification of an "overpayment" set forth in section 607; and, accordingly, irrespective of the Government's contentions, said section 611 does not bar a taxpayer's right to recover interest seized, which was not assessed prior to June 2, 1924. The petitioner contends, therefore, that the District Court erred in failing to render judgment for the petitioner for the amount of interest seized ($62,040.08), none of which was assessed prior to June 2, 1924.

12. In addition to the errors set forth above (in paragrapn 11) your petitioner particularly urges those further errors which are specified in its brief filed herewith in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Court of Appeals in the said case entitled *American Glue Company v. United States,* No. 2497, to the end that the said case may be reviewed and determined by this Court as provided in sections 347 and 350, Title 28, of the United States Code, and that your petitioner's case may be heard immediately following the cases above mentioned (numbers 36, 65, 104, 105), now pending before this Court, and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate, and that said judgment of the District Court for the District of Massachusetts in said case and every part thereof may be reversed by this Honorable Court.

Respectfully submitted,
HARRIS H. GILMAN,
Attorney for Petitioner.



FILE COPY

Office Supreme Court,
FILED
OCT 21 19
CHARLES ELMORE CR
CL

No. 519

Supreme Court of the United States.

No.

American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

Brief in Support of Petition for Writ of Certiorari.

HARRIS H. GILMAN,
Attorney for Petitioner.

ARMSON O. KNOWLES & SON, LAW PRINTERS, BOSTON.

TABLE OF CONTENTS.

	Page
Judgment to be reviewed	1
Jurisdiction of this Court	1
Statement of the case	2
Specification of errors relied on	2
Argument	4
Summary and introduction	4
A. The contentions of the petitioner, which may be open to appellants in those cases in which certiorari has been already granted	5
B. Two important questions raised in petitioner's case which are not presented in the cases now pending before the Court	10
1. An actual seizure by distraint of the petitioner's property is not a "payment" under section 611	10
2. The interest seized in petitioner's case not having been assessed prior to June 2, 1924, does not come within the provisions of section 611 of the Revenue Act of 1928	11
Appendix	13

TABLE OF AUTHORITIES.

Cases Cited.

Aldridge v. Williams, 3 How. 9; 11 L. Ed. 469	7
Bank of United States v. Bank of Washington, 6 Peters, 8	10
Bowers v. New York & Albany Lighterage Co., 273 U.S. 346; 47 S. Ct. 389; 71 L. Ed. 676	5
Bronson v. Rodes, 74 U.S. 229; 19 L. Ed. 141	10
Central Trust Co. of Illinois et al. v. Cassidy, 300 Fed. 386	10
Clinton Iron & Steel Co. v. Heiner, 30 Fed. (2d) 542	6

	Page
Danzer v. Gulf & Ship Island Railroad Co., 268 U.S. 633; 69 L. Ed. 1126	7
Diamond Alkali Co. v. Heiner, 39 Fed. (2d) 643	5
Dodge et al. v. Freedman's Savings & Trust Co., 93 U.S. 379; 23 L. Ed. 920	10
Dwight & Lloyd Sintering Co., Inc., v. American Ore Reclamation Co., 263 Fed. 315; 252 U.S. 582; 64 L. Ed. 727, certiorari denied	8
Ellay Co. v. Bowers, 25 Fed. (2d) 637; certiorari denied, 48 S. Ct. 601	9
Fontenot v. Accardo, 278 Fed. 871	8
Fullerton-Kruger Lumber Co. v. Northern Pacific R.R. Co., 266 U.S. 435; 69 L. Ed. 367	7
Gove v. Nichols, 23 Fed. (2d) 856	9
Graham v. Dupont, 283 Fed. 300; reversed, 262 U.S. 234; 67 L. Ed. 965	8
Graham v. Goodcell, 35 Fed. (2d) 586; 50 Sup. Ct. 240	4
Heiner v. Erie Coal & Coke Co., 42 Fed. (2d) 214	2, 9
Hicks v. Mercantile Trust Co., 269 U.S. 283; 70 L. Ed. 275	1
Hill v. Wallace, 259 U.S. 44; 66 L. Ed. 822	8
Huntley v. Gile, 32 Fed. (2d) 857	2
Ledbetter v. Bailey, 274 Fed. 375	8
Lincoln v. United States, 202 U.S. 484; 50 L. Ed. 1117	6
Lipke v. Lederer, 259 U.S. 557; 66 L. Ed. 1061	8
Luckenbach v. McCahan Sugar Co., 248 U.S. 139; 63 L. Ed. 170	10
McLeod v. United States, 229 U.S. 416; 57 L. Ed. 1260	6
Magee v. United States, 37 Fed. (2d) 763; 50 Sup. Ct. 407	2, 4
Marble v. Kirkendall, 267 Fed. 498	8
Merritt v. Welsh, 104 U.S. 694; 26 L. Ed. 896	7
Middleton v. Mee, 277 Fed. 492	8
Oak Worsted Mills v. United States, 36 Fed. (2d) 529; 50 Sup. Ct. 465	4

Page

Pillsbury Flour Mills Co. v. Great Northern Ry., 25 Fed. (2d) 66 8

Polk v. Page, 276 Fed. 128; reversed by C.C.A. 281 Fed. 74 8

Reeves v. Anderson, July 21, 1930 2

Russell et al. v. United States, 278 U.S. 181; 73 L. Ed. 255 6

Schwab v. Doyle, 258 U.S. 529; 66 L. Ed. 747 6

Sugarland Industries v. Bass, 36 Fed. (2d) 375 7

Taft Woolen Mills v. United States, Ct. Cl. March, 1930; 50 Sup. Ct. 465 4

Thornhill Wagon Co. v. Noel, 17 Fed. (2d) 407 9

United States v. Burden, Smith Co., 33 Fed. (2d) 229 2, 7

United States v. Magnolia Petroleum Co., 276 U.S. 160; 72 L. Ed. 509 6

United States v. Missouri Pacific R.R., 278 U.S. 269; 73 L. Ed. 322 7

United States v. Ninety Nine Diamonds, 139 Fed. 961; certiorari denied, 201 U.S. 645; 50 L. Ed. 903 8

United States v. Trans-Missouri Freight Assn., 166 U.S. 290; 41 L. Ed. 1007 7

Untermyer v. Anderson, 276 U.S. 440; 72 L. Ed. 645 6

TEXT BOOK CITED.

48 Corpus Juris, 585 10

STATUTES CITED.

Sec. 250 (*d*) of Rev. Act of 1921 5, 9, 13

Rev. Stat. secs. 3220, 3226 2, 5, 6, 13

Rev. Act of 1928, secs. 607 and 611 2, 3, 4, 5, 6, 7, 9, 11, 14

Rev. Act of 1926, sec. 1106 (*a*) 9, 15

Rev. Act of 1928, sec. 612 9, 15

Supreme Court of the United States.

OCTOBER TERM, 1930.

No.

AMERICAN GLUE COMPANY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court for the District of Massachusetts was rendered June 26, 1930, and is reported in 42 Fed. (2d) 235, and appears in the record (R. 25).

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of sections 347 and 350 of Title 28 of the United States Code as set forth in the petition submitted herewith. Such a case may be set down for early hearing with other cases already pending before the Court and involving somewhat similar questions, as was done in the case of *Hicks* v. *Mercantile Trust Co.*, 269 U.S. 283; 70 L. Ed. 275.

2. This case involves the applicability and interpretation of certain Federal statutes and acts; namely, sections 3220 and 3226 of Revised Statutes as amended, and sections 607 and 611 of the Revenue Act of 1928.

3. The decisions in the various Circuit Courts of Appeals and in the Court of Claims are in conflict on the principal question involved. The general question has been decided for the taxpayer in the 3d and 5th Circuits, and for the Government in the 2d and 9th Circuits and the Court of Claims.

See—

For the taxpayer:

Heiner v. *Erie Coal & Coke Co.* (C.C.A. 3), 42 Fed. (2d) 214.

United States v. *Burden, Smith Co.* (C.C.A. 5), 33 Fed. (2d) 229.

For the Government:

Reeves v. *Anderson* (C.C.A. 2), (July 21, 1930).

Huntley v. *Gile* (C.C.A. 9), 32 Fed. (2d) 857.

Magee v. *United States* (Ct. Cl.), 37 Fed. (2d) 763.

III.

Facts.

The principal facts, issues and questions in this case are set forth in the petition for certiorari.

IV.

Specification of Errors.

The petitioner maintains that the District Court for the District of Massachusetts erred in its rulings, opinion and judgment, as set forth in the assignment of error filed by the petitioner in the District Court (R. 33).

Among them, the petitioner particularly urges the following errors:

1. That the said District Court erred in ruling that the petitioner was not entitled to recover from the United States of America said sum of $233,263.89 with interest thereon from the date of seizure of said sum, under the provisions of Revised Statutes, sections 3220 and 3226 as amended (R. 16, 33).

2. That the said District Court erred in failing to give judgment for the petitioner at least for the amount of interest seized ($62,040.08) which was not assessed prior to June 2, 1924 (R. 33).

3. That the said District Court erred in that it refused to rule that sections 607 and 611 of the Revenue Act of 1928 did not take away any rights to recover for said illegal seizure which the petitioner had at the date of the enactment of said Revenue Act (R. 17).

4. That the said District Court erred in that it ruled that section 607 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the Revenue Laws (R. 27).

5. That the said District Court erred in that it refused to rule that section 611 of the Revenue Act of 1928 did not by express terms or by implication do more than limit the scope and effect of section 607 of the Revenue Act of 1928 and did not of itself grant any rights or privileges (R. 17).

6. That the said District Court erred in that it ruled that the provisions of section 611 of the Revenue Act of 1928 apply to the facts of this case and defeat the petitioner's right to recover (R. 18, 33).

7. That the said District Court erred in that it ruled that the word "stayed" as used in section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed," and that if there was a voluntary or involuntary delay following upon or occasioned by a claim in abatement, the

collection of the tax was "stayed" within the meaning of said section (R. 18, 31).

8. That the said District Court erred in that it ruled that the collection of the additional tax assessed against the petitioner was "stayed" within the meaning of the word as used in section 611 of the Revenue Act of 1928 (R. 18).

9. That the said District Court erred in that it ruled that resort may properly be had to reports of legislative committees for the purpose of ascertaining the meaning, the occasion for and the necessity for the enactment of section 607 and section 611 of the Revenue Act of 1928 (R. 32).

10. That the District Court erred in that it ruled that a seizure of the petitioner's money in a national bank under a warrant of distraint was a "payment" within the meaning of that word as used in section 611 of the Revenue Act of 1928 (R. 32).

V.

Argument.

Introduction.

The principal contentions of the petitioner upon which it relies may be divided into—

(1) Those contentions which the petitioner believes are open to the other appellants and petitioners in those cases involving somewhat analogous questions now pending before the United States Supreme Court, *i.e.*, No. 36, *Graham* v. *Goodcell;* No. 104, *Oak Worsted Mills* v. *United States;* No. 65, *Magee* v. *United States;* and No. 105, *Taft Woolen Mills* v. *United States.*

(2) Those further contentions which are based upon unusual features of the petitioner's case, and upon which this petitioner relies as additional and compelling reasons for the allowance of this petition for certiorari, and its prayer that this case may be heard with said cases above set forth.

A.

THE CONTENTIONS OF THE PETITIONER, WHICH MAY BE OPEN TO APPELLANTS IN THOSE CASES IN WHICH CERTIORARI HAS ALREADY BEEN GRANTED ARE HEREINAFTER BRIEFLY SET FORTH WITH A CITATION OF AUTHORITIES.

1. The seizure of the petitioner's money from a national bank under a warrant of distraint over two and one-half years after the running of the five-year period of limitation provided in section 250 (*d*) of the Revenue Act of 1921 was illegal, and the petitioner had a right to recover said amount so seized with interest, under the provisions of sections 3220 and 3226 of Revised Statutes.

Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346; 47 S. Ct. 389; 71 L. Ed. 676.

2. The petitioner's rights under sections 3220 and 3226 of Revised Statutes are not based in any way whatsoever on the provisions of section 607; and the provisions of section 611 have no application to the petitioner's case.

See section 607, Appendix, p. 14.
Section 611 of the Revenue Act of 1928, Appendix, p. 14.

3. Section 611 by its express terms merely limits the operation of section 607.

4. Sections 607 and 611 of the Revenue Act of 1928 are procedural in character and refer only to administrative action of the Commissioner, as does section 3220 of Revised Statutes. Section 607 confers power on the Commissioner to refund or credit amounts voluntarily paid in certain instances after the period of limitation, and thus creates a new class of "overpayments" not previously recognized by the law.

Diamond Alkali Co. v. *Heiner*, 39 Fed. (2d) 643.

5. There is no implied repeal of sections 3220 and 3226 of Revised Statutes by sections 607 and 611 of the Revenue Act of 1928, because repeals by implication are not favored in the law.

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160; 72 L. Ed. 509.
Schwab v. *Doyle*, 258 U.S. 529; 66 L. Ed. 747.
Russell et al. v. *United States*, 278 U.S. 181; 73 L. Ed. 255.

6. Said section 611 does not retroactively ratify illegal collections, as it makes no reference to such collections; and, furthermore, said section in no way specifies the particular acts to be ratified, which is a recognized requirement of a statute which attempts to ratify an illegal act of a Government official.

Lincoln v. *United States*, 202 U.S. 484; 50 L. Ed. 1117.
McLeod v. *United States*, 229 U.S. 416; 57 L. Ed. 1260.
Clinton Iron & Steel Co. v. *Heiner*, 30 Fed. (2d) 542.

7. Said section 611 does not withdraw the Government's consent to be sued for an illegal collection, since it contains no express words to that effect.

Lincoln v. *United States, supra.*
McLeod v. *United States, supra.*

8. Said section 611 does not retroactively extend the statute of limitations which was in force and effect prior to the passage of the Revenue Act of 1928, for a statute will not be given such retroactive effect unless its words compel this interpretation.

Untermyer v. *Anderson*, 276 U.S. 440; 72 L. Ed. 645.

Danzer v. *Gulf & Ship Island Railroad Co.*, 268 U.S. 633; 69 L. Ed. 1126.
Fullerton-Kruger Lumber Co. v. *Northern Pacific R.R. Co.*, 266 U.S. 435; 69 L. Ed. 367.

9. Said sections 607 and 611 of the Revenue Act of 1928 have a clear meaning and therefore no reference should be made to the Congressional records to change the clear meaning of the words used in said sections. Such reference to Congressional records should be made only in cases where the language of the statute is obscure and ambiguous.

United States v. *Burden, Smith & Co.*, 33 Fed. (2d) 229.
United States v. *Missouri Pacific R.R.*, 278 U.S. 269; 73 L. Ed. 322.
Aldridge v. *Williams*, 3 How. 9, 24; 11 L. Ed. 469, 476.
Merritt v. *Welsh*, 104 U.S. 694; 26 L. Ed. 896.
United States v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 318; 41 L. Ed. 1007, 1020.

10. The word "stay" in said section 611 refers to a legal "stay," and does not refer to a mere "delay" by the Collector of Internal Revenue. If Congress had intended to cover a case of mere inaction, it would have used the word "delay."

Sugarland Industries v. *Bass*, 36 Fed. (2d) 375.
United States v. *Burden, Smith & Co.*, *supra*.

The Government admitted in the case of American Glue Co. that there was no legal stay which prevented the Collector from collecting the tax at any time (R. 16); and the Government relied upon the proposition that "stay" means "delay."

11. Section 611 was properly drafted to protect Collectors in cases where there had been a legal stay of collection of taxes. In the past, injunctions had been granted to legally stay collections, and this situation had to be recognized.

In the following cases injunctions were granted which stayed the collection of the tax even though the injunctions in some instances were not later upheld:

Hill v. *Wallace,* 259 U.S. 44; 66 L. Ed. 822.
Graham v. *Dupont,* 283 Fed. 300; reversed, 262 U.S. 234; 67 L. Ed. 965.
Lipke v. *Lederer,* (1922) 259 U.S. 557; 66 L. Ed. 1061.
Ledbetter v. *Bailey,* (1921) 274 Fed. 375.
Fontenot v. *Accardo,* (1922) 278 Fed. 871.
Middleton v. *Mee,* (1921) 277 Fed. 492.
Marble v. *Kirkendall,* (1920) 267 Fed. 498.
Polk v. *Page,* (1921) 276 Fed. 128; reversed by C.C.A. 281 Fed. 74.

12. If the word "stayed," in section 611, is held to mean merely "delayed," then the phrase "if the collection of any part thereof was stayed" in said section has no meaning, since, in every case where the period of limitation expires, there is, necessarily a "delay" in collection. Effect should be given to every word in a statute.

United States v. *Ninety Nine Diamonds,* 139 Fed. 961 (C.C.A. 8, 1905); certiorari denied, 201 U.S. 645; 50 L. Ed. 903.
Dwight & Lloyd Sintering Co., Inc., v. *American Ore Reclamation Co.,* 263 Fed. 315 (C.C.A. 2); 252 U.S. 582; 64 L. Ed. 727, certiorari denied.
Pillsbury Flour Mills Co. v. *Great Northern Ry.,* 25 Fed. (2d) 66 (C.C.A. 8).

13. If the word "stayed," in section 611, is construed to mean a "delay" caused by a claim in abatement, then the rights of the taxpayer in each case depend upon the state of mind of the Collector, as his state of mind when he failed to collect the tax would determine whether such failure was due to the filing of a claim in abatement or to mere neglect on his part. Surely Congress could not have intended this result.

14. The Collector failed to collect within the period of limitation in this and similar cases because the Commissioner of Internal Revenue ruled that, under section 250 (*d*) of the Revenue Act of 1921, distraint was not a "proceeding," and that collection could be made at any time under a warrant of distraint (I.T. 1446; 1 I.R.B. 37-504; 2 C.B. 218).

15. Section 1106 (*a*) of the Revenue Act of 1926 extinguished the taxpayer's liability, and sections 607, 611 and 612 of the Revenue Act of 1928 could not recreate a tax liability so extinguished.

Thornhill Wagon Co. v. *Noel*, 17 Fed. (2d) 407.
Gove v. *Nichols*, 23 Fed. (2d) 856.
Ellay Co. v. *Bowers* (C.C.A.), 25 Fed. (2d) 637; certiorari denied, 48 S. Ct. 601.
Heiner v. *Erie Coal & Coke Co.*, 42 Fed. (2d) 214.
Section 1106 (*a*) of the Revenue Act of 1926, Appendix, p. 15.
Section 612 of the Revenue Act of 1928, Appendix, p. 15.

B.

Two Important Questions Raised in the Petitioner's Case which are Not Presented in the Cases now Pending before the Court.

1. An actual seizure by distraint of the petitioner's property is not a "payment" under section 611.

(*a*) The meaning of the word "payment" is plain, and it has been legally defined and construed. The authorities hold that an intention on the part of the debtor to extinguish the debt is essential to constitute a payment.

Dodge et al. v. *Freedman's Savings & Trust Co.*, 93 U.S. 379; 23 L. Ed. 920.

Bank of United States v. *Bank of Washington*, 6 Peters, 8.

Luckenbach v. *McCahan Sugar Co.*, 248 U.S. 139; 63 L. Ed. 170.

Central Trust Co. of Illinois et al. v. *Cassidy*, 300 Fed. 386.

48 Corpus Juris, 585.

(*b*) The verb "to pay" is transitive. However used it connotes an act by the "payer."

Bronson v. *Rodes*, 74 U.S. 229; 19 L. Ed. 141.
Luckenbach v. *McCahan Sugar Co., supra.*

(*c*) It is clear that where property is seized by distraint there is no act on the part of the debtor, and no intention on his part to discharge the debt.

(*d*) If Congress had wished to include collection and seizure, as well as payment, within the meaning of section 611, it would have used the word "collected," as in other parts of the act.

See Revenue Act of 1928, sections 11, 12, 13, 101 (*a*), 101 (*d*), 201 (*b*), 204 (*a*), 272 (*b*), 291, 322 (*c*).

(e) The Treasury Department has officially ruled that the words "payments made" in said section 611 apply only to *voluntary payments*, made after the date of the passage of the Revenue Act of 1928, and not to seizures or collections.

Mim. 3600; VII-2 C.B. 82.

It is inconsistent for the Government to contend before the Courts that "payment" applies to seizures and collections made prior to the passage of the Revenue Act of 1928, while at the same time it admits in the rulings of the Treasury Department that said word applies only to voluntary payments made after the passage of said act.

(f) Section 611 was enacted only after there had been stricken therefrom, as originally introduced into the House, a provision authorizing collection by distraint. This shows a deliberate Congressional intent to limit this section to "payments," and not to include "collections."

2. The interest seized in the petitioner's case not having been assessed prior to June 2, 1924, does not come within the provisions of section 611 of the Revenue Act of 1928.

Irrespective of the contentions of the Government in regard to the meaning and applications of section 611, it is clear that said section has no effect on the interest which was not assessed prior to June 2, 1924.

Section 611 expressly applies—

> "If any Internal Revenue tax (or any interest penalty, additional amount or addition to such tax) was within the period of limitation properly applicable thereto assessed prior to June 2, 1924."

No additional assessment other than the assessment of $173,674.61 was ever made by the Commissioner of Internal Revenue. See Assessment Card (R. 20-21).

It is submitted, therefore, that at least the said sum of $62,040.08, which was seized on November 24, 1925, and which the Collector claimed to be interest on an unpaid tax, should be refunded, in that the collection was illegal and recovery thereof cannot be barred by the provisions of section 611 under any interpretation.

It is further submitted that, in view of all the above considerations, the rulings, opinion and judgment of the District Court for the District of Massachusetts were clearly erroneous and that the intervention of your Honorable Court is urgently requested so that the additional questions of great public interest presented by your petitioner's case may be considered at the time that a decision is rendered in the cases involving somewhat similar questions which are now pending before the Court.

HARRIS H. GILMAN.

APPENDIX.

Section 250 (d) of the Revenue Act of 1921.

"(d) . . . no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts . . . shall be begun, after the expiration of five years after the date when such return was filed, . . ."

Revised Statutes, Section 3220 (as amended by the Revenue Act of 1928).

"Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.

Revised Statutes, Section 3226 (as amended by Section 1113 (a) of the Revenue Act of 1926).

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected

without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Revenue Act of 1928.

Section 607—*Effect of Expiration of Period of Limitation against United States.*

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 611—*Collections Stayed by Claim in Abatement.*

"If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed,

with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Revenue Act of 1926, Section 1106 (a).

Final Determinations and Assessments.

The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability, but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Revenue Act of 1928, Section 612.

Repeal of Section 1106 (a) of 1926 Act.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.